Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-856

MILTON LEVIN,

Appellant,

against

FRANK A. GULOTTA, individually and as Presiding Justice, Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, *et al.*,

Appellees.

LEVIN'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Predictably, the appellees have based their argument for dismissal on a claim that the decision of the divided panel below rests on abstention—even though only *one* of the three panel members (Neaher, D.J.) said he would abstain. While we anticipated this argument in Levin's Jurisdictional Statement (at 5, 29-31), a few points must now be emphasized in light of the appellees' specific contentions.

First, to recapitulate: Judge Neaher was the *only* member of the three-judge court to say that he would abstain,

although even he ruled on the merits of Levin's constitutional claims (A17a-27a) and voted to continue the federal stay against Levin's suspension from practice by the State pending disposition of this case on appeal (A33a).

True, Judge Moore joined Judge Neaher in the order dismissing Levin's complaint, but that order was not based on abstention*—for Judge Moore agreed to dismiss *only* on the merits of Levin's constitutional claims. As Judge Moore wrote (A34a):

> "I agree that the complaints herein should be dismissed, *but I would dismiss on the merits* and hold that New York's procedures for disciplining attorneys are constitutional for the reasons stated in Judge Neaher's opinion" (emphasis added).

Judge Moore, thus, joined only in that portion of Judge Neaher's opinion which resolved the merits of Levin's claims. Accordingly, the majority decision in this case rests on a resolution of the merits, not on abstention.** Consequently, direct review by this Court of Levin's case is fully consistent with the rule of *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975).

Second, the appellees' reliance on *Mendez* v. *Heller*, 420 U.S. 916 (1975), *vacating and remanding*, 380 F. Supp. 985 (E.D.N.Y. 1974), is misplaced. There, this Court declined

* The "order," printed at the foot of Judge Neaher's opinion, merely states:

> "The Clerk is directed to enter judgment dismissing the complaints. Since serious procedural and substantive issues are presented, we unanimously agree that the stays previously entered will be continued pending disposition on appeals" (A33a).

** Put another way, Judge Neaher was the *dissenter* below on the abstention issue. The panel resolved that issue 2-1 in Levin's favor, while ruling 2-1 against Levin on the merits.

§1253 jurisdiction where the majority of a three-judge court had ruled against the plaintiff *both* on the merits *and* on a ground short of the merits (lack of a case or controversy). In fact, the *Mendez* majority wrote expressly that the "case or controversy" ground was a "coordinate • • • ground of decision" (380 F. Supp. at 993), an independent basis for dismissing the complaint.

But in our case, abstention was *not* a "coordinate" or independent ground for dismissal. It was simply the view of one of the three judges.

Further, *Mendez* was decided by the district court before this Court's decision in *MTM, Inc.* v. *Baxley, supra*, which dramatically limited the availability of §1253 review.* But the three judges in our case wrote with full knowledge of *MTM*; and, as his concurring opinion makes clear, Judge Moore had *MTM* very much in mind in deciding *not* to rule on any basis other than the merits. Thus, Judge Moore wrote (A34a, 36a, 37a):

> "A possible alternative is abstention. *Since the constitutional question is of sufficient importance to be resolved by our highest court,* superficially it would seem to make little difference what the outcome in this court might be. However, any such nonchalant approach is quickly foreclosed by recent admonitions of the Supreme Court itself [citing and discussing *MTM*].
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> • • •
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> *Procedural obstacles should not prevent the real issue from being decided, if possible.* • • • At this stage it would seem a needless expenditure of judicial

* The district court's decision in *Mendez* preceded also this Court's ruling in *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974), which began the journey that *MTM* completed.

energy to dissolve this court and remand (as in ***MTM***) to the District Court 'so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals.' (*MTM* at 1281.) ***Such courts would only be met by the same arguments which plaintiffs adequately present here.***

• • •

But why in a day when conservation of judicial effort is so important should the courts shy away from deciding the issue now before them" (emphasis added).

Third, as Judges Moore and Weinstein held (A34a-37a, A50a-51a), abstention plainly was inappropriate in this case. When Levin commenced this federal action, there was no pending State proceeding against him; and he made no attempt to enjoin the prosecution of any such proceeding. *Compare Erdmann* v. *Stevens,* 458 F.2d 1205 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972). Also here, unlike *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592 (1975), Levin had exhausted his State appellate remedies *before* commencing this federal §1983 action—to the extent of unsuccessfully seeking an appeal, including an appeal on constitutional issues (F151a-158a), from the State's highest appellate court (the New York Court of Appeals). Indeed, as discussed in Levin's Jurisdictional Statement (at 17-23), the lack of appellate rights for attorneys in New York disciplinary proceedings is one of Levin's chief constitutional complaints.

Finally, the "protective" appeal noticed by Levin to the Second Circuit obviously does not furnish any basis whatsoever for this Court to decline §1253 jurisdiction. And in any event, as we previously advised this Court, the

appellees have misrepresented the nature of the activity in this case concerning the Second Circuit (or more accurately, the Second Circuit's Staff Counsel).*

In arguing for affirmance, the appellees have said little about the merits (Motion, at 5-6). What they have said, however, is misleading and, therefore, must be answered.

Thus, the appellees contend that the "statutory procedures" which Levin attacks "permit the New York Court of Appeals • • • to grant leave to appeal to any attorney who has been subjected to disciplinary action by the Appellate Division" (Motion, at 5). But the appellees omit to mention that *no other* aggrieved New York professionals or civil or criminal litigants have to apply for "leave to appeal." All of them have at least one appeal, on all questions, ***as of right.***

The appellees also contend that Article 6, §3 of the New York State Constitution "circumscribes the jurisdiction of the State Court of Appeals in all cases, not only in lawyer disciplinary cases" (Motion, at 5-6). Again, the facts are not as the appellees suggest:

Article 6, §3 of the State Constitution provides, in pertinent part:

> "The jurisdiction of the court of appeals shall be limited to the review of questions of law *except* • • • where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding,

* We respectfully refer the Court to the letter filed in this docket, dated February 13, 1976, from Simon H. Rifkind, Esq., one of Levin's attorneys on this appeal.

> finds new facts and a final judgment or a final order pursuant thereto is entered * * *" (G161a-167a) (emphasis added.)*

By virtue of this provision, in a New York civil or criminal litigation, where the appellate division reverses the trial court and finds new facts (at least impliedly)**, the aggrieved litigant is entitled to a review in the State Court of Appeals on all questions of *fact* as well as questions of law.

Similarly, all non-attorney professionals in New York have an automatic right of appeal to the State Court of Appeals through an "Article 78 Proceeding" if the appellate division reverses or modifies a favorable finding by the administrative trier-of-fact. Cohen and Karger, *Powers of the New York Court of Appeals* §51, at 233 (rev. ed. 1951); CPLR 5601(a)(ii)(iii). And, if in so reversing or modifying, the appellate division has "expressly or impliedly found new facts," then the scope of review in the Court of Appeals embraces *all* questions of fact and law. CPLR 5501(b).

But New York attorneys have no similar, let alone equivalent, rights. This is so because, as we have seen (J.S. 9-11), the appellate division is the court of first instance (or trier-of-fact) in New York attorney disciplinary proceedings. Consequently, the appellate division's disaffirmance of its appointed referee (such as the partial disaffirmance in Levin's case) *does not* constitute a "reversal" or "modification" such as would give rise to the rights of

* This constitutional provision has been implemented through CPLR 5501(b) and 5601(a)(ii)(iii) (G164a-165a).

** See CPLR 5501(b) (G164a).

appeal that the State grants to all others, even if the appellate division has "expressly or impliedly found new facts." Accordingly, even if the State Court of Appeals decides to review an attorney's case, it may not review questions of fact, but must sustain the appellate division's finding of guilt if there is *any* evidence to support it—even if only the proverbial scintilla. *Matter of Goodman*, 199 N.Y. 143, 92 N.E. 211 (1910).

Hence, the appellees' discussion of the State Constitution is inaccurate. The fact is that, by making the appellate divisions the courts of first instance in attorney disciplinary proceedings, the New York Attorney Disciplinary Statute denies to attorneys the rights of review that would otherwise be available to them under Article 6, §3 of the State Constitution if the appellate division sat (as it does not) in its normal capacity as a court of review.

In closing, we note that the appellees have not offered any justification for the State's discrimination against attorneys in denying them appellate rights.* Nor have they made any response whatsoever to Levin's other constitutional claims, relating to the lack of a fair hearing in New York attorney disciplinary proceedings (J.S. 23-29). Levin, of course, presses each of these claims as independent grounds for declaring New York's statutory attorney disciplinary procedure unconstitutional, null and void.

* As an afterthought justification, the appellees tender recent criticism of the legal profession for delays in processing disciplinary proceedings (Motion, at 5)—as if that made any difference to the disposition of Levin's constitutional claims. It obviously does not. Speed may not be bought at the expense of fundamental personal rights (J.S. 15-17)—especially when those rights can fully be protected without engendering delay by a simple amendment of the current disciplinary procedure (J.S. 14-15).

Conclusion

For the foregoing reasons, and those stated in Levin's Jurisdictional Statement, this Court should deny the appellees' motion to dismiss or affirm.

Respectfully submitted,

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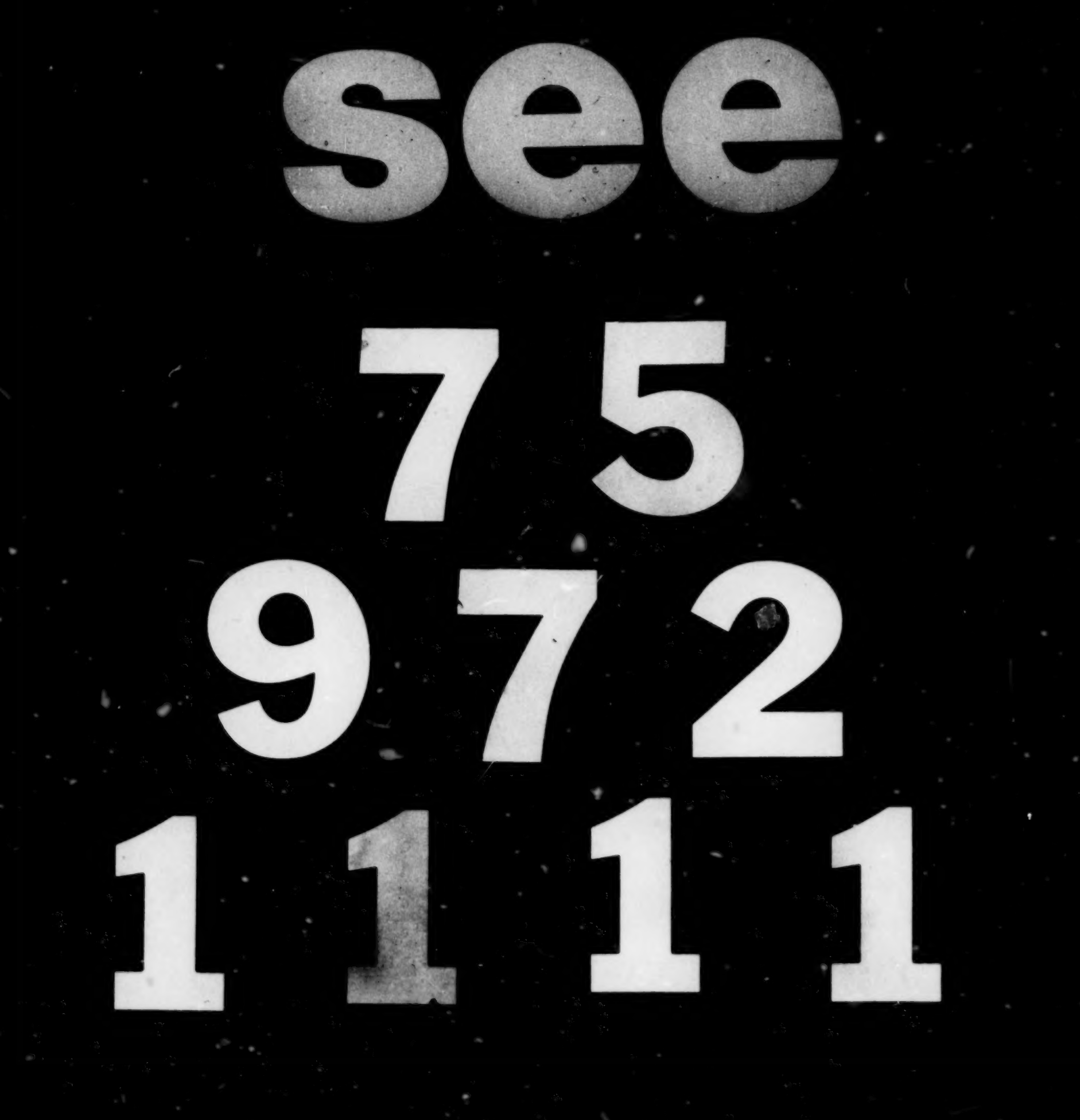
February 19, 1976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